IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

HUNTHAUSER HOLDINGS, LLC, Plaintiff,	)	**CIVIL ACTION**
v.	)	No. 00-1154-MLB
DAVID LOESCH and GREG ERHARD, Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

Before the court are the following:

(1) Plaintiff's motion to reconsider (Doc. 125); and

(2) Defendants' response (Doc. 126).

Plaintiff asks the court to reconsider its May 1, 2003 Memorandum and Order (Doc. 124) denying plaintiff's motion for summary judgment. The facts of this case have already been discussed and will not be repeated here. Upon due consideration, the court adheres to its original judgment. Plaintiff's motion is DENIED.

II. STANDARDS GOVERNING MOTION TO RECONSIDER

> A motion to reconsider . . . gives the court the opportunity to correct manifest errors of law or fact and to review newly discovered evidence. A motion to reconsider is proper when the court has obviously misapprehended a party's position, the facts or the law, or has decided issues outside of those presented in the original motion. A motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed.

Voelkel v. Gen. Motors Corp., 846 F. Supp. 1482, 1483 (D. Kan. 1994) (citations omitted); see also D. Kan. R. 7.3(b) (stating that

a motion to reconsider shall be based upon an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice).

III. ANALYSIS

Plaintiff argues that the court's Memorandum and Order "is clearly erroneous because it improperly assumes that a fact question about whether a well 'can produce', a contingency which might extend the subject oil and gas lease, is material to the rights of Plaintiff" (Doc. 125 at 1). Plaintiff's position–that the continued validity of the Soderstrom lease is not an issue–appears to have changed. Prior to the court's Memorandum and Order, plaintiff filed a pleading devoted almost entirely to the contingency provided in the habendum clause.[1] In that pleading,

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[1] In the parties' initial round of briefing, plaintiff took the position that the Soderstrom lease expired at the end of its primary term because there was no production of oil and gas in paying quantities during the primary term (Doc. 109 at 8-10). Defendants argued that the continued validity of the lease depended on a determination of whether cessation of production was temporary or permanent (Doc. 113 at 8-9). Neither side focused on the specific language of the habendum clause that extended the lease beyond its primary term for "as long thereafter as oil, gas . . . or any of the products covered by this lease is or can be produced" (Emphasis supplied).

There are no published Kansas decisions which discuss the specific habendum clause in this case. Until the court found Anadarko Petroleum v. Thompson, 94 S.W. 3d 550 (Tex. 2002), cited in its May 1 Memorandum and Order, it rather assumed that the "or can be produced" language was unique to the Soderstrom lease. Evidently, such is not the case. In David E. Pierce et al., Cases and Materials on Oil and Gas Law 202 (4th ed. 2002), the authors observe:

> [s]ometimes "capability of production" type language can be found in leases used in "actual production" jurisdictions; for example, The American Association of Professional Landmen Form AAPL No. 690, approved for use in Kansas, provides:

plaintiff narrowly framed the case by stating that "the only contested issue is whether the Soderstrom Salvation Army lease, for which the primary term expired in August, 1998, continues in effect to the present day even though there is no evidence of any production of oil and gas after January, 1999" (Doc. 116 at 4). Plaintiff also noted in that pleading that the "key issue" before the court was "whether the older Salvation Army Lease taken by Glen Soderstrom expired of its own terms when all production from the lease ceased" (Doc. 116 ¶ 25).

> This lease shall remain in force for a primary term of _____ years and as long thereafter as oil, gas or other hydrocarbons is or can be produced. (Emphasis added.)
>
> Does such language change the rule that applies? See Tate v. Stanolind Oil & Gas Co., 240 P.2d 465 (Kan.1952). What if the term clause provided that the lease would extend "as long as oil, gas or other hydrocarbons is found"? Compare Tate v. Stanolind, supra, and Bouldin v. Gulf Prod. Co., 5 S.W.2d 1019 (Tex.Civ.App.1928) (lease is extended if oil or gas is "discovered" or "found" in the primary term so long as the lessee exercised diligence in continuing operations to produce the discovered oil or gas) with Greenfield v. Thill, 521 N.W.2d 87 (N.D.1994); Reese Enters., Inc. v. Lawson, 553 P.2d 885 (Kan.1976); Cassell v. Crothers, 44 A. 446 (Pa.1899); and Tedrow v. Shaffer, 155 N.E. 510 (OhioApp.1926) ("found in paying quantities" requires "production in paying quantities").

Id. at 202.

As noted in the initial Memorandum and Order, Tate v. Stanolind Oil & Gas Co., 172 Kan. 351 (1952), stands for the proposition that the majority of courts require actual production during the primary term of the lease to extend the lease beyond its fixed term. However, the court qualified that general rule with the following statement: "This, at least, is true unless the lease contains some additional provision indicating an intent to extend the right to produce beyond the primary term." 172 Kan. at 355. The habendum clause in the case does just that, and this court has no reason to think that the Kansas Supreme Court would construe the habendum clause differently than has this court.

Contrary to plaintiff's position, the court believes the validity of the Soderstrom lease is material unless, of course, plaintiff is willing to stipulate that the lease is valid and try the case solely on its bona fide purchaser theory. Plaintiff has given no indication that it is willing to do so. In addressing plaintiff's motion, the court will thus proceed on the basis that proper resolution of plaintiff's claim for a declaratory judgment requires a two-pronged determination: (1) Was plaintiff an innocent purchaser for value? (2) Is the Soderstrom lease invalid? If either question can be answered in the affirmative, plaintiff may prevail.[2] The court is confident, however, that questions of fact preclude summary judgment with respect to both.

A. Innocent Purchaser For Value

Plaintiff states that "the claim of defendants (or their predecessors) is legally flawed as to third parties for failure to file an affidavit of production pursuant to K.S.A. § [55-205]." The statute provides:

> if [an oil and gas] lease contains the statement of any contingency upon the happening of which the term of any such lease may be extended . . . the owner of said lease may at any time before the expiration of the definite term of said lease file with the . . . register of deeds an affidavit setting forth the description of the lease, that the affiant is the owner thereof and the facts showing that the required contingency has happened.

Kan. Stat. Ann. § 55-205. "The sole purpose of the statute is to give notice to the public that an oil and gas lease has been

[2] The two-pronged determination set forth by the court applies only to the resolution of plaintiff's claim for declaratory judgment. The court makes no attempt here to set forth the requirements for recovery by the defendants or any other lessor to the Soderstrom lease.

extended beyond its primary term." Cities Serv. Oil Co. v. Adair, 273 F.2d 673, 677 (10th Cir. 1959).

While section 55-205 does not impose an absolute duty on an owner of a lease to file an affidavit pronouncing the satisfaction of a required contingency, plaintiff is correct in asserting that the absence of such an affidavit is sufficient to establish that someone in plaintiff's position had no constructive notice of the potential validity of the Soderstrom lease. See Davis v. Cities Serv. Oil Co., 338 F.2d 70, 73 (10th Cir. 1964) (noting that the statute requires an owner to file an affidavit establishing the satisfaction of a required contingency "if the owner desires to protect himself against innocent purchasers for value"). But even without constructive notice, plaintiff's claim depends on whether it was an innocent purchaser for value, and plaintiff set forth no facts supporting its entitlement to that status.

Plaintiff did, however, present evidence that Soderstrom filed an affidavit of nondevelopment, which stated that "no oil, gas or other minerals have been produced from any part of said land for the past year and . . . no development or drilling operations for oil, gas or other minerals are now being prosecuted upon said land" (Doc. 109 exh. 7.a). Based on Soderstrom's affidavit, plaintiff argues that:

> the public record specifically discloses that a production contingency had not occurred. As the court's order currently stands, unrecorded events or facts could jeopardize any oil and gas lease in Kansas. Such a rule, which would create indefinable and unrecorded inchoate encumbrances on oil and gas properties, is clearly erroneous and would also result in manifest injustice to an entire industry which depends on the public record

(Doc. 125 at 2). But the court declines to view its plain language interpretation of the habendum clause–which plaintiff consistently declines to address in its entirety–as spelling the end of the oil and gas industry in Kansas. The court did not draft this clause; rather someone presumably familiar with industry practice did so.

The habendum clause extends the lease beyond its primary term for "as long thereafter as oil, gas . . . or any of the products covered by this lease is or can be produced" (emphasis supplied). Because the validity of the Soderstrom lease depends on the alternative contingencies of the continued production of the Stanco #1 well or its capability to produce, Soderstrom's "affidavit of nondevelopment" does not suffice as notice that the lease is invalid. But because neither defendants nor their predecessors filed an affidavit pursuant to section 55-205 that positively asserts the satisfaction of either contingency in the habendum clause, plaintiff effectively had no constructive notice of the lease's potential validity. Nevertheless, plaintiff cannot prevail on an innocent purchaser for value theory because though it had no constructive notice, questions exist regarding whether plaintiff also had no actual notice and was in fact a purchaser for value.[3]

B. Validity of the Soderstrom Lease

Plaintiff next states that the Soderstrom lease contains a cessation of production clause that "has the effect of limiting the

[3] If plaintiff had no actual notice, then it might be an innocent purchaser for value, assuming plaintiff can also establish, both factually and legally, that it was a purchaser for value. Such a showing may moot the question of the lease's continued validity due to the "can be produced" language.

time within which to resume production under other contingencies," and that the court's interpretation of the habendum clause effectively writes the cessation of production clause out of the lease (Doc. 125 at 3). The cessation of production clause in the Soderstrom lease states:

> [i]f, after the expiration of the primary term of this lease, production on the leased premises shall cease from any cause, this lease shall not terminate provided lessee resumes operations for drilling a well within sixty (60) days from such cessation, and this lease shall remain in force during the prosecution of such operations and, if production results therefrom, then as long as production continues

(Doc. 109 exh. 7.d). But plaintiff's interpretation requires defendants or their predecessors "to resume drilling operations within sixty days of any cessation in actual production even if the existing well remained capable of production. Such a construction disregards the habendum clause's 'can be produced' language . . . ." Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 556 (Tex. 2002) (interpreting clauses identical to those at issue in the Soderstrom lease). When read together, the habendum and cessation of production clauses can only reasonably be interpreted to require the lessee to resume drilling operations within sixty days from the date on which the Stanco #1 well ceases to produce or be capable of production. See id. ("[T]he cessation-of-production clause only applies if a well holding the lease ceases to be capable of producing gas.").

Plaintiff finally states that "courts have held that a forfeiture caused by a lengthy cessation of production cannot be avoided through subsequent production" (Doc. 125 at 3). Plaintiff

cites Wagner v. Sunray Mid-Continent Oil Co., 182 Kan. 81 (1957) and Tucker v. Hugoton Energy Corp., 253 Kan. 373 (1993) for support. The court in Wagner interpreted an habendum clause that conditioned the validity of the lease beyond its primary term on the continued production of oil or gas or the development or operation of the property, not on the capability of production. Wagner, 182 Kan. at 82. The court in Tucker held that "a limited market precluded invocation of the shut-in royalty provisions." Tucker, 253 Kan. at 382. Because neither court had an opportunity to interpret the specific habendum clause at issue in the Soderstrom lease, the cases cited by plaintiff are not relevant to the court's decision.

IV. CONCLUSION

Proper resolution of this case has at times resembled a moving target due to the somewhat unique nature of the issues involved. For example, the court has heard some evidence, produced by defendants, regarding capability of production but only in the context of ruling on plaintiff's motion for summary judgment. It does not know whether plaintiff has evidence that the well is incapable of production in paying quantities. The court also has not determined, after considering the authority and argument offered by counsel, whether the "can be produced" language of the habendum clause should be construed to refer only to a physical capability to produce or whether the language encompasses non-physical bars to production such as the TRO or the KCC order. As the court noted in its Memorandum and Order, the status of those two matters is unknown.

The court is confident, however, that with the continued assistance of the parties' highly competent counsel, a final resolution can be reached, albeit not one which will please all parties. Upon reconsideration, the court determines that questions of fact exist regarding the validity of the Soderstrom lease and whether plaintiff was an innocent purchaser for value in acquiring its lease. Plaintiff's motion for reconsideration is therefore DENIED (Doc. 125).

IT IS SO ORDERED.

Dated this 10th day of June at Wichita, Kansas.

/s Monti Belot
Monti L. Belot
UNITED STATES DISTRICT JUDGE